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IN THE

Supreme Court of the United States

October Term, 1959

BLUE MOUNTAIN CONSTRUCTION COMPANY, a Corporation,

Petitioner,

vs. No.

H. C. WERNER and TAUE CHARNESKI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

Petitioner, plaintiff below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed, by a divided Court, a judgment of the United States District Court for the District of Oregon dismissing petitioner's action with prejudice.

OPINIONS BELOW

The trial court entered no written opinion, but the oral remarks of the trial judge bearing upon the question here presented may be found in the printed Transcript of Record[1] at pages 32 to 38. The majority and dissenting opinions of the Court of Appeals have not yet appeared in the Federal Reporter, but are printed in the appendix hereto, *infra* p. 12, and are also included in the certified Transcript.

In compliance with Rule 23(j), the judgments of the District Court and Court of Appeals are reproduced in the appendix hereto, *infra* p. 25.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was dated and entered August 19, 1959 (Tr. 58). A timely petition for rehearing was filed on September 9, 1959 (Tr. 59), and the petition for rehearing was thereafter denied on September 21, 1959 (Tr. 59). This petition is therefore timely under 63 Stat. 104, 28 U.S.C. §2101(c).

This Court has jurisdiction to review the judgment

[1] References to "Tr." herein refer to the pages of the original transcript of record from the Court of Appeals, which includes the printed record used in the Court of Appeals. There has also been filed herein, at petitioner's request, a supplemental transcript embodying proceedings on petitioner's application to the Court of Appeals for a writ of mandamus and proceedings on a motion to dismiss petitioner's appeal to the Court of Appeals, designated herein as "Supp. Tr."

by writ of certiorari by virtue of 62 Stat. 928, 28 U.S.C. §1254(1).

QUESTION PRESENTED

Did the Oregon District Court abuse its discretion in denying petitioner's motion and renewed motion for a voluntary dismissal without prejudice pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, where petitioner's motion therefor was made only forty-four days after the commencement of the action, at which time respondents (defendants below) had interposed an answer which contained no counterclaim and asked no affirmative relief, and where no other proceedings had been had nor discovery procedures employed, and where petitioner, in support of its motion, showed the court by affidavit that the dismissal was desired in order to commence an action against respondents and their sureties on the same transaction in the Eastern District of Washington under the Miller Act (49 Stat. 793-4, 40 U.S.C. §270a&b), the Eastern District of Washington being the District in which the work was to be performed and consequently the only District in which a Miller Act suit could be brought?

STATUTES INVOLVED

This case involves Rule 41(a) of the Federal Rules of Civil Procedure, providing as follows:

"DISMISSAL OF ACTIONS

"(a) Voluntary Dismissal: Effect Thereof

"(1) *By plaintiff; by Stipulation.* Subject to the provisions of the Rule 23(c), and Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

"(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

It also involves that portion of the Miller Act, 49 Stat. 794, 49 U.S.C. §270b, which provides,

"Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the con-

tract was to be performed and executed and not elsewhere. * * * * * *"

STATEMENT OF THE CASE

Respondents Werner and Charneski were the prime contractors with the United States of America, Bureau of Reclamation, for the construction of certain irrigation works and canals in Grant County, State of Washington, and petitioner entered into three subcontracts with respondents for the performance of certain portions of the work (Tr. 15).

On April 4, 1958 petitioner commenced this action in the Oregon District Court by the filing of a complaint, and the defendants were thereafter served on April 9, 1958 (Tr. 42). Diversity of citizenship was the basis for the federal jurisdiction of the Oregon District Court, the complaint alleging the Washington corporate citizenship of the petitioner and the Oregon citizenship of the two respondents, the amount sought by the complaint being $140,989.40 (Tr. 3-4). Petitioner's complaint sought damages from the respondents for alleged breaches of the three subcontracts, and reformation of one of the subcontracts was also prayed for (Tr. 3-9).

On April 25, 1958, fourteen days after being served, respondents served and thereafter filed an answer containing no counterclaim and asking no affirmative relief (Tr. 10-13).

On May 19, 1958, forty-four days after the commencement of the action, one of petitioner's counsel

orally moved the Honorable Gus J. Solomon, one of the judges of the Oregon District Court, for a voluntary dismissal without prejudice (Tr. 29-31). At that time respondent's counsel objected to the oral motion, but made no showing in opposition except to say:

> "We have undertaken at considerable expense to go through this thing and prepare ourselves for answer and also to prepare ourselves for trial." (Tr. 31).

Judge Solomon thereupon denied the oral motion (Tr. 31).

Four days later, on May 23, 1958, petitioner filed a "Motion for Reconsideration of and Renewing Plaintiff's Motion for a Voluntary Dismissal Without Prejudice pursuant to Rule 41(a)(2)," this motion being supported by an affidavit fully stating the reasons why the dismissal was desired (Tr. 14-17).

In substance, the affidavit set forth that petitioner had improvidently started the Oregon action and wished to start an action against respondents and their sureties on the same transaction, but on a different theory, under the Miller Act, and that such new action could only be started in the Eastern District of Washington where the work under the contract was to be performed.

The renewed motion was reached for argument on June 16, 1958 (Tr. 32, 42). Again respondents' counsel made no showing in opposition and Judge Solomon first indicated that the motion to dismiss would be granted, "provided you give defendants assurances

in a form satisfactory to them, and if they cannot be satisfied, then you will have to satisfy me, that no such actions as were brought here will be brought against them in the State of Washington." (Tr. 36). Petitioner's counsel thereupon endeavored to obtain some clarification from Judge Solomon as to just what he had in mind in this respect, and some further colloquy occurred which terminated in a statement by Judge Solomon that appellant's motion for a dismissal without prejudice would be denied (Tr. 37-38). The only reason expressed by Judge Solomon for the denial was, "You have hedged on me. You cannot do that in this court." (Tr. 38).

It should be noted that, in the affidavit in support of the renewed motion for dismissal it was stated that, "affiant is prepared to personally meet such terms as the court may feel are proper." (Tr. 17). Also on the June 16th hearing petitioner's counsel stated to the court that "I am personally prepared to meet any damages which your Honor feels are warranted in the situation." (Tr. 34).

Upon denying petitioner's motion, Judge Solomon set the case for pre-trial conference on July 21, 1958 (Tr. 14). Petitioner thereupon filed a motion in the Court of Appeals for the Ninth Circuit seeking a writ of mandamus, but said motion was denied by the Court of Appeals on July 16, 1958, the order of the Court of Appeals in this respect stating as follows:

> "The motion for leave to file a petition for writ of mandamus discloses that the District Judge, in refusing to permit the action to be dismissed

after answer had been filed, was acting within the limits of discretion and mandamus does not lie to control such discretion." (Supp. Tr. Vol. II).

Immediately thereafter, on July 17, 1958, petitioner served and filed a notice of its election to stand upon its position that it was entitled to a dismissal without prejudice and of petitioner's intention to not proceed further with the action (Tr. 18-19). Thereupon an order was entered by Judge Solomon on August 4, 1958, on respondent's motion, dismissing the action with prejudice (Tr. 43). Appeal to the Court of Appeals for the Ninth Circuit resulted in an affirmance by a divided three-judge Court, Judges Orr and Fee being for affirmance, and Judge Healy being of the opinion that the District Judge had abused his discretion and that the judgment should be reversed.

REASONS FOR ALLOWANCE OF THE WRIT

Among the "Considerations Governing Review on Certiorari" set forth in this Court's Rule 19 is *the sanctioning by a Court of Appeals of such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.* No other words could be found to more aptly describe what has occurred in this case.

Deeply rooted in the procedural concepts held by all lawyers is the availability of resort to a voluntary dismissal without prejudice when matters have taken

an unexpected turn or a better theory has been evolved, and the action has not progressed to the point where the defendant would be basically prejudiced by a dismissal. That rule 41 of the Federal Rules of Civil Procedure was not intended to disturb this basic concept is demonstrated by the decision of this Court in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1946), wherein it was said,

> "Take the case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time a litigant might know or have reason to believe that he could fill the crucial gap in the evidence. Traditionally, a plaintiff in such a dilemma has an unqualified right, upon payment of costs, to take a non-suit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice, other than the mere prospect of a second law suit. (Citing cases). Rule 41(a) (1) preserves this unqualified right of the plaintiff to a dismissal without prejudice prior to the filing of defendant's answer. And after the filing of an answer, Rule 41 (a) (2) still permits a trial court to grant a dismissal without prejudice 'upon such terms and conditions as the court deems proper.'"

What was done by the District Judge in this case most assuredly did violence to the *tradition* recognized by this Court in the *Cone* case — or in other words was a most radical departure from the "accepted and usual course of judicial proceedings." No reason existed for the denial of petitioner's motion for a voluntary dismissal. True, an answer had been

filed so that, under Rule 41(a), petitioner no longer had an absolute right to such a dismissal, but no counter-claim was made nor affirmative relief sought therein and no other proceedings had occurred nor discovery procedures employed. The action was but forty-four days old. Terms were offered by petitioner and could adequately compensate respondents for any inconvenience suffered. Moreover, petitioner's affidavit showed compelling reasons why the dismissal was desired.

Aside from petitioner's reasons as expressed in its affidavit, the motion presented the minimum conceivable situation under Rule 41(a) (2). If it is to be held that a district judge can deny such a motion in the present situation, then Rule 41(a) (2) becomes meaningless and a district judge can uniformly deny all such motions, no matter what the circumstances. Surely this Court intended no such result in formulating the rule.

We suggest that there are "special and important reasons" for granting this writ — that it is of concern to the public whether the published opinion of the Court of Appeals sanctioning the action of the district judge is to be available as precedent for further like rulings deviating from the true intent and purpose of Rule 41(a) (2). Just as there were special and important reasons for this Court to promulgate the Federal Rules of Civil Procedure in the first place, so also is it equally important to the bench, the bar and the public that radical misapplications

of the rules should be corrected where embodied in published opinions. In this vein is *Societe Internationale v. Rogers*, 357 U.S. 197, 203 (1958), where this Court stated that it had granted certiorari because the decision of the Court of Appeals "raised important questions as to the proper application of the Federal Rules of Civil Procedure."

If Rule 41(a) (2) was intended to confer unlimited power on a district judge to force an unwilling plaintiff to proceed, with a dismissal with prejudice the only alternative, then it would seem to be a matter of public importance that lawyers be clearly forewarned of this radical change in procedural concept by a decision to that effect by this Court.

On the other hand, if as we believe, Rule 41(a) (2) was intended to generally preserve the availability of a voluntary dismissal while vesting discretion in the district judge to protect a defendant against unreasonable or unjustifiable applications, then the decision of the Court of Appeals in this case should not be permitted to stand.

Respectfully submitted.

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BLUE MOUNTAIN CONSTRUCTION COMPANY, a Corporation, *Appellant*,

vs.

H. C. WERNER AND TAUF CHARNESKI, *Appellees*.

No. 16,206

Aug. 19, 1959

Appeal from the United States District Court for the District of Oregon.

Before: HEALY, ORR and FEE, Circuit Judges.

ORR, Circuit Judge:

On the 4th day of April, 1958, appellant filed in the United States District Court of Oregon a complaint seeking damages for alleged breaches of three sub contracts entered into with appellees.

On April 28, 1958, defendants served and filed their answer. No affirmative relief was sought.

On May 19, 1958, appellant moved for a dismissal of the action without prejudice under Rule 41(a) (2), FRCP.[1] No supporting affidavit was presented and

[1] Rule 41(a) (2) provides that "except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the

no reasons were given for the dismissal. Appellee objected to the dismissal on the ground that appellee had "undertaken at considerable expense to go through this thing and prepare ourselves for our answer and also to prepare ourselves for trial."

The court denied the motion. Whether or not a dismissal will be granted is within the sound judicial discretion of the court. *Ockert v. Union Barge Line Corp.*, 190 F.2d 303 (3rd Cir. 1951); *Rollison v. Washington National Ins. Co.*, 176 F.2d 364 (4th Cir. 1949). We think it follows that each case must be determined on its own particular facts. We find no abuse of discretion in the denial of this motion. There was no showing whatever in support of the motion. It was no more than a request. Counsel for appellants, other than the one making the first motion, evidently sensing the inadequacy of the showing made in support of said motion, on May 23, 1958 filed a second motion entitled "Motion for Reconsideration of and Renewing Plaintiff's Motion for a Voluntary Dismissal Without Prejudice pursuant to Rule 41(a)(2)." This motion was supported by an affidavit setting forth the reasons why the dismissal was desired.

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court and upon such terms and conditions as the court deems proper. . . ."

Paragraph (1) of the subdivision provides that "an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action

In essence the supporting affidavit stated: that plaintiff's attorney had erroneously concluded that the only forum available to appellants to obtain redress on its alleged causes of action was by an action in the United States District Court of Oregon, inasmuch as the appellees were residents of Oregon and could not be reached in a suit instituted in the state of Washington; that thereafter appellant's attorney determined that this theory was erroneous and further determined that his clients had a cause of action under the Miller Act §270 (a) & (b), 49 Stat. 793 (1935), 40 U.S.C.A. §270 (a) & (b),[2] and that under the terms of said act an action under it could only be brought in the district court having jurisdiction of the area in which the work was performed, in this case the Eastern District of Washington. Thus we have appellant squarely representing to the trial court that their purpose in requesting a dismissal in the Oregon District was to enable them to institute an action in the Eastern District of Washington.

The trial court had before it this picture upon

[2] "(a) Before any contract, exceeding $2,000 in amount, for the construction . . . of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds . . . (1) A performance bond . . . for the protection of the United States. (2) A payment bond . . . for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person . . .

(b) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this

which to act in exercising its discretion whether to dismiss. The dismissal was desired in order to permit an action in the State of Washington because under appellant's theory a suit under the Miller Act, which they wished to bring, could only be brought where the contract was to be performed. According to appellees this is a debatable question because, as they argue, the requirement of the Miller Act relates only to venue,[3] citing *Texas Construction Company v. United States*, 236 F.2d 138 (5th Cir. 1956). That case does not depart from the established rule that a competent court could have jurisdiction of a case and try it where improper venue was laid only in the event the parties agreed. Of course the trial court here could not speculate as to whether the sureties would waive venue in the event they were made parties in the Oregon suit, nor did it try. However it nowhere appears that it was necessary to sue the sureties, no showing being made that the appellees are insolvent. Appellant's complaint alleges three causes of action, two based on breach of contract and one for reformation of contract.

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title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last act of labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount unpaid at the time of institution of such suit."

[3]The part of §270(b) in issue states "every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere."

The first cause of action was for damages for failure to complete the concrete lining of a tunnel in time. The second cause of action was also for failure to complete the concrete lining of a tunnel in time. The third cause of action was for reformation so as to include certain provisions for the method of lining the tunnels and a time element.

The Miller Act provides that the requirement of the bond shall be for insuring payment of all persons "supplying labor and material." (See note 2, supra). Appellees have argued that the causes of action alleged in the complaint in the Oregon Court could not have been brought under the Miller Act, hence the reasons given for dismissal had no validity. We expressly refrain from passing on this question. It is, we understand, before the District Court of Washington at this time. It should be noted, however, that the trial court in Oregon offered to dismiss the action there founded, as we have said, on breach of contract and for a reformation without prejudice if appellant would agree not to sue on said causes of action in Washington. What if any effect such an agreement would have had on the future right to litigate said causes of action in Oregon we are unable to say.

As against this lack of showing on the part of appellant, the trial court was justified in turning to the other side of the coin. The defendants have been brought into court in the State of their residence, a matter of great convenience to them. We understand that their witnesses reside in that jurisdiction. To

require them to pull up stakes and move to another state would entail considerable additional expenses of hotel accommodations for the litigants and witnesses and the trial court could reasonably conclude that appellees' lawyers would require additional fees and expenses to travel to a foreign state to try the case. It may be argued that appellees would have been subjected to these same expenses had appellant seen fit to sue in Washington in the first instance. That may be so, but we think that a court in exercising its discretion as to whether a dismissal for the express purpose of allowing a plaintiff to bring an action in a foreign state should be granted, is entitled to consider whether a plaintiff should be allowed to snatch from a defendant certain monetary advantages and conveniences which appellant has conferred by its voluntary act.

After the denial of their motion to dismiss, appellant informed the court that they refused to proceed further. Appellant took this position at its peril. If the trial court was in error in refusing to dismiss without prejudice appellant was on safe ground, but on the other hand, as we find there was no abuse of discretion then the subsequent action of the court in dismissing the action with prejudice for want of prosecution was proper.

The trial court set the case for pre-trial conference on July 21, 1958. The matter came on for pre-trial conference on said date. No appearance was made for or on behalf of appellant. In view of the infor-

mation given the court that appellant would not proceed further, it justifiably concluded that there was a failure to prosecute and dismissed the action with prejudice under Rule 17[4] of the Oregon District Court and Rule 41(b) FRCP.[5]

Subsequent to the denial of the motion to dismiss and the later order of the trial court dismissing with prejudice, appellant endeavored to have this court by means of a Writ of Mandamus order the trial court to dismiss without prejudice. This court refused the Writ stating that in its opinion the trial court did not abuse its discretion. Later appellees endeavored to have this appeal dismissed on the ground that the refusal of the Writ of Mandamus controlled. A different panel of the court heard the motion to dismiss and denied it. This action in refusing to dismiss the appeal may have detracted from the controlling effect of the holding in the mandamus proceeding, but the finding by this court in the Mandamus action that the trial court did not abuse its discretion is at least persuasive.

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[4]"All actions must be prosecuted with due diligence, and any action not so prosecuted may be dismissed for want of prosecution."

[5]"For failure of the plaintiff to prosecute or to comply with . . . any order of the court, a defendant may move for dismissal of an action or any complaint against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

Under the facts and circumstances presented, the judgment of dismissal with prejudice is affirmed.

JAMES ALGER FEE, Circuit Judge, concurring:

The trial court did not abuse its discretion in failing to permit dismissal after answer had been filed simply because counsel had changed his theory and believed he had a better chance to win in the federal court in Washington. The court had the right to consider the disadvantages arising to defendants by such action. This Court refused to issue a preliminary writ of mandamus upon the ground that discretion had not been abused but required appellant to go to trial in the action in Oregon.

Appellant continued to fence for advantage. After the mandamus proceeding had been dismissed, the trial court, by order dated May 19, 1958, set the case for formal pretrial conference on July 21, 1958. On July 17, appellant filed a motion where it declined to proceed further in the above action. The trial court dismissed the action with prejudice under Rule 17 of the Oregon District Court, which provides:

> "All actions must be prosecuted with due diligence, and any action not so prosecuted may be dismissed for want of prosecution."

Irrespective of the question of abuse of discretion, the trial court had a right to dismiss the cause under this Rule because of the positive defiance of the order of the court setting the case for pretrial conference. All questions could have been raised at the pretrial

conference, including that of the effect of an adjudication of this case upon the subsequent case which appellant had brought in the Eastern District of Washington.

The judgment of dismissal should be affirmed.

HEALY, Circuit Judge, Dissenting

I am not disposed to go along with my associates in this case. In my opinion the judgment below should be reversed.

Preliminarily, as the majority opinion has stated, appellant, on the 4th day of April, 1958, filed in the district court its complaint seeking damages for claimed breaches of contract. On April 28 following appellees served and filed an answer containing no counter claim and asking no affirmative relief. On May 19 thereafter appellant, through its Oregon counsel, orally moved for a dismissal of the action without prejudice under Rule 41(a) (2), Federal Rules of Civil Procedure, which motion was denied by minute entry on the same day. In denying the motion, the court said: "The right to be sued in your own community is a valuable right. The motion is denied." Clearly, such is an advantage and a convenience, but appellees have no legal right to be sued in Oregon. The venue statute which is applicable in diversity actions, 28 U.S.C.A. §1391(a), permits actions to be brought either in the district court where all defendants or all plaintiffs reside.

On May 23, appellant filed a motion for reconsid-

eration and renewal of the earlier motion for voluntary dismissal without prejudice, pursuant to statute. The motion was supported by affidavit of a Mr. Jerome Williams, primary attorney for plaintiff residing in the state of Washington, giving an elaborate statement of his reasons for the motion. A hearing was held on this motion on June 16, 1958, and in the course of the proceedings Mr. Williams among other things stated: "And, as I said in the affidavit, I am personally prepared to meet any damages which your Honor feels are warranted in the situation." The motion was thereafter on the same day denied, without opinion. On August 4, 1958, the district court dismissed the action with prejudice.

It is my opinion that the trial court was obliged to allow appellant to dismiss without prejudice pursuant to the Rule and that in dismissing with prejudice the court abused its discretion under the particular facts of this case.

Rule 41(a) (2) provides that an action shall not be dismissed at plaintiff's instance after answer has been filed except under order of the court and upon such terms and conditions as the court deems proper. Plaintiff can not dismiss as a matter of right after service of answer; and in ruling on a motion to dismiss an action without prejudice after service of answer the court is obliged to exercise a sound judicial discretion. Consult *Home Owners' Loan Corp. vs. Huffman*, 8 Cir., 134 F. 2d. 314, 316. But, in exercising its discretion, the court is obliged to recognize the

rule which has long been followed in both law and equity, and which has traditionally allowed voluntary dismissals without prejudice after payment of defendant's costs in a situation where defendant will not suffer any legal prejudice beyond incidental annoyance of a second litigation on the same subject. *Home Owners' Loan Corp. v. Huffman*, supra. This rule, governing the exercise of a trial court's judicial discretion, was reiterated by the Supreme Court in the case of *Cone v. West Virginia Pulp & Paper Co.* (1947), 330 U.S. 212, 217. There the Court observed: "Take the case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time a litigant might know or have reason to believe that he could fill the crucial gap in the evidence. Traditionally, a plaintiff in such a dilemma has had an unqualified right, upon payments of costs, to take a nonsuit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit."

Barron & Holtzoff[1] in its discussion of the subject cites the *Cone* case and observes: "In exercising its discretion the court follows the traditional principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second law suit."

The types of cases in which defendants would suffer

[1]Barron & Holtzoff, Federal Practice and Procedure, Vol. 2, §912, 1958 Pocket Parts.

"plain legal prejudice," thereby justifying refusal of a dismissal without prejudice, are set out in Moore's Federal Practice (2d Ed.), Vol. 5, at p. 1021, as: "Where defendant had filed its answer and had gone to great expense in preparation for trial; where answer showed that plaintiff's claim was barred by the statute of limitations; where the court had denied on undisputed facts an application for a preliminary injunction; where the action had long been pending and plaintiff had not been diligent; where plaintiff had no right to prosecute the action in her own name; where no sufficient reason was given for dismissal; where motion was made after defendant had moved for summary judgment and in order to bring another action in another state having a longer period of limitation; where plaintiff had amended complaint three times, had had a pretrial conference and had been served with answers to interrogatories; where the motion to dismiss was made after the close of plaintiff's case; where defendant was entitled to a directed verdict at the end of plaintiff's case; where a verdict for plaintiff was set aside and judgment rendered for defendant; where the action had been remanded after reversal upon appeal; and where 'to do otherwise would be an abuse of justice.'"

What burdens, one may ask, have appellees here borne which could not be adequately compensated by the imposition of terms and conditions? Here appellees had filed no counter claim and were asking no affirmative relief. Appellees had filed their answer

only 22 days prior to appellant's motion for dismissal without prejudice pursuant to the Rules of Civil Procedure. No depositions or interrogatories had been taken or served. No witnesses had been transported to Oregon from distant places for trial. Indeed, the record shows that appellees had borne only the expense of answering, which burden could have been relieved by court order conditioning dismissal without prejudice.

(Endorsed:) Opinion, Concurring Opinion and Dissenting Opinion. Filed Aug. 19, 1959.

PAUL P. O'BRIEN, *Clerk.*

Appendix B

JUDGMENTS IN COURTS BELOW

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BLUE MOUNTAIN CONSTRUCTION COMPANY, a Corporation, *Plaintiff*,

vs.

H. C. WERNER and TAUF CHARNESKI, *Defendants*.

No. 9738

ORDER DISMISSING ACTION WITH PREJUDICE

The above-entitled matter having come on regularly for hearing before the Court on the 4th day of August, 1958, upon motion of defendants for an Order of Dismissal of plaintiff's action with prejudice; and

It appearing to the Court that plaintiff on or about the 19th day of May, 1958, moved the Court for an Order dismissing its action without prejudice pursuant to Rule 41(a) (2) of the Federal Rules of Civil Procedure, and that thereafter and on the 10th day of May, 1958, said motion was duly heard and the Court entered an order denying plaintiff's motion; thereafter plaintiff moved the Court for a reconsideration of its aforesaid motion, and on or about the 16th day of June, 1958, the motion for reconsidera-

tion was duly and regularly heard by the Court, plaintiff appearing by one of its attorneys, Mr. Jerome Williams, and defendants appearing by Mr. Leo Levenson, one of their attorneys, and the Court having heard the statements of the respective counsel and having considered the record and having inquired of counsel for the plaintiff if he would assure the Court that in the event the Court granted the motion to dismiss without prejudice that plaintiff would agree to limit any action it might subsequently institute against defendants respecting the matters alleged in its complaint to an action under 40 U.S.C.A. 270, commonly referred to as the Miller Act, and counsel having indicated to the Court that plaintiff would not accept such a condition, the Court thereupon adhered to its former ruling and denied plaintiff's motion for dismissal without prejudice and directed that the action be duly prosecuted and noted the matter for pretrial on July 21, 1958; that notices of said pretrial hearing date were mailed to counsel for the respective parties; thereafter plaintiff on or about the 17th day of July, 1958, filed in this Court a pleading entitled, Notice of Election, wherein plaintiff asserted that it was electing to stand upon its aforesaid motions to dismiss without prejudice and that it would not proceed further with the above-entitled action filed in this court; that on the 21st day of July, 1958, the above matter was regularly called for pretrial conference and the defendants were present by their attorneys, Mr. Norman B. Kobin and

Mr. Leo Levenson, but the plaintiff wholly failed to appear at all or by counsel; that the Court did thereupon again reset the matter for a pretrial to be held on August 4, 1958, at 10:00 o'clock a.m.; that prior thereto and on the 24th day of July, 1958, defendants filed a Motion for a Dismissal of plaintiff's action with prejudice based upon its failure to prosecute said action with due diligence; that said Motion to Dismiss with prejudice was duly noted for hearing by the Court for August 4, 1958, at the hour of 10:00 o'clock a.m., and plaintiffs were notified of the time and place thereof by mailing of a certified copy of said motion together with accompanying affidavit and notice of said hearing to Mr. Jerome Williams, Attorney for the Plaintiff, Paulsen Building, Spokane, Washington, and receipt thereof was acknowledged by Mr. Jerome Williams in writing on the 24th day of July, 1958, and by personally serving a certified copy of said motion together with accompanying affidavit and notice of hearing upon Mr. Lester W. Humphreys, of counsel for plaintiff, Yeon Building, Portland, Oregon, on the 23rd day of July, 1958; that on the 25th day of July, 1958, the Clerk of the above-entitled Court duly notified the respective parties through their respective counsel by written notice that the above action was set for pretrial on August 4, 1958; that thereafter and on August 4, 1958, at the hour of 10:00 o'clock a.m., the Court did call said case for pretrial and the plaintiff failed to respond to said call, neither the plaintiff or any of its counsel being in attendance, the defendants being represented

by Norman B. Kobin and Leo Levenson; that the Court thereupon duly considered the motion of defendants for dismissal of plaintiff's action with prejudice, and having found that said motion was well taken in that plaintiff had declared that it would not proceed further with the due prosecution of its action in a pleading entitled Notice of Election and having failed to appear and answer the call for pretrial and failing to appear in opposition to defendants' motion and pursuant to Rule 17 of this court and Rule 41(2)(b) of the Federal Rules of Civil Procedure, and the Court being fully advised,

It is hereby Ordered that plaintiff's complaint be and the same is hereby dismissed with prejudice, and that defendants have judgment against the plaintiff for their costs and disbursements.

Dated this 4th day of August, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

Presented by:

/s/ LEO LEVENSON,
Of Attorneys for Defendants.

(Endorsed): Filed August 8, 1958.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BLUE MOUNTAIN CONSTRUCTION COMPANY, a Corporation,
Appellant,

vs.

H. C. WERNER and TAUF CHARNESKI,
Appellees.

No. 16,206

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgement

Filed and entered: August 19, 1959

PAUL P. O'BRIEN, Clerk